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YONG CHOU CHEN

v.

LING MING SING

B

HIGH COURT SABAH & SARAWAK, MIRI
ZULKIFLI BAKAR J
[CIVIL APPEAL NO: 12-25-2004 (MR)]
25 MARCH 2008

C ***CIVIL PROCEDURE:*** *Trial - Adjournment - Appeal against decision of sessions court judge disallowing application for adjournment - Unfettered discretion of judge whether to grant adjournment - Whether judge exercised his discretion correctly*

D ***CIVIL PROCEDURE:*** *Trial - Conduct of proceedings - Whether sessions court judge could proceed with trial in the absence of 2nd defendant and/or his counsel - Rules of the High Court 1980, O. 35 r. 1(2)*

E ***CIVIL PROCEDURE:*** *Adjournment - Refusal - Appeal against decision of sessions court judge disallowing application for adjournment - Unfettered discretion of judge whether to grant adjournment - Whether judge exercised his discretion correctly*

F ***CIVIL PROCEDURE:*** *Absence of party - Continuation of trial - Whether sessions court judge could proceed with trial in the absence of 2nd defendant and/or his counsel - Rules of the High Court 1980, O. 35 r. 1(2)*

G ***CIVIL PROCEDURE:*** *Appearance - Failure by one party to appear - Whether sessions court judge could proceed with trial in the absence of 2nd defendant and/or his counsel - Rules of the High Court 1980, O. 35 r. 1(2)*

H This was an appeal by the 2nd defendant/appellant against the decision of the sessions court judge disallowing the appellant's application for adjournment and proceeding to hear the case and enter judgment against the appellant. It was the appellant's submission that the sessions court judge's continuation of the trial without the presence of the appellant and/or his counsel was in breach of the rules of natural justice. The respondent, however, I contended that the sessions court judge possessed the discretionary power to grant the adjournment and had not acted in excess of his

jurisdiction in proceeding with the trial. The issues requiring determination were: (i) whether the sessions court judge had erred in law in not granting the adjournment; and (ii) whether the sessions court judge could proceed with the trial in the absence of the appellant and/or his counsel.

Held (dismissing the appeal with costs):

(1) It is wholly at the unfettered discretion of a judge as to whether an adjournment should be granted in a particular case. On the facts of the present case, the sessions court judge had correctly exercised his discretion in refusing the appellant's application for adjournment as the appellant had requested adjournments too many times without valid reason or justification. Such a practice was a waste of the court's time. *Lee Ah Tee v. Ong Tiow Pheng & Ors* (foll). (paras 15-17)

(2) Order 35 r. 1(2) Rules of the High Court 1980 empowers a judge to continue a trial if one party was absent, and the sessions court judge in this case was right to allow the trial to continue without the presence of the appellant and/or his counsel. The appellant's counsel could not attend the trial as he had to attend another hearing elsewhere and counsel standing in for him was not given the requisite authority to conduct a trial. The court had in fact given the appellant and/or his counsel the opportunity to provide a defence which they, however, failed to utilise by not attending the trial. (paras 18-20)

Case(s) referred to:
Burgoise v. Taylor [1878] 9 Ch D 1 ***(refd)***
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(foll)***
Dick v. Piller [1943] All ER 627 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 35 r. 1(2)

For the appellant/2nd defendant - Tai Choi Yu; M/s Tai Choi Yu & Co
For the respondent/plaintiff - Toh Ah Mei (Merlyn Toh with him); M/s Yi & Co

Reported by Suresh Nathan

A

JUDGMENT

Zulkifli Bakar J:

Background

B **[1]** This is an appeal by appellant/Yong Chou Chuen (2nd defendant in Sessions Court) against my decision made on 25 March 2008 wherein I dismissed the appeal with costs for the respondent/plaintiff to be taxed unless otherwise agreed. At the first instance, this is an appeal by the appellant/2nd defendant C against the Sessions Court Judge's decision where he disallowed application for adjournment by 2nd defendant's counsel and proceeded to hear this case and judgment was entered against 2nd defendant.

D

The Plaintiff's Claims

Brief Facts And Chronology

[2] The background facts leading to this action by the plaintiff are these. The plaintiff commenced this action against 2nd E defendant to recover the sum RM80,000 being the amount due and outstanding under a loan agreement granted to the 1st defendant. The 2nd defendant was sued as the guarantor in this case *via* a Letter of Guarantee and Indemnity dated 26 January 1999. The plaintiff claimed for friendly loan against the 1st F defendant and against the 2nd defendant as guarantor for the said sum. Judgment in default had been entered against the 1st defendant on 28 September 1999 and the trial herein is only against the 2nd defendant.

G **[3]** On 19 May 2004, the Sessions Court had fixed this case for continuation of the trial. However, counsel for the 2nd defendant was unable to be present on the said date and informed the court through a letter dated 13 May 2004 and appointed a stand-in counsel to apply for adjournment for the reason that he has a H hearing in Kuching High Court. However, the Sessions Court judge disallowed the application for adjournment and proceeded to hear this case and judgment was entered against the 2nd defendant.

I **[4]** Therefore, the 2nd defendant filed the notice of appeal on 29 May 2004 against the decision of the learned Sessions Court Judge. Hence this appeal.

[5] This court adjourned the said hearing and fixed 25 March 2008 at 9am for clarifications on submissions, Reply and Decision (CRD) of this appeal. On the same date, this court delivered the ruling. Appeal is dismissed with costs for the respondent/plaintiff to be taxed unless agreed.

The Defence

[6] The defence by the 2nd defendant can be summarily be limited to one issue only, that is:

> Whether the learned Sessions Court judge had erred in law by not granting an adjournment and proceeding with the continuation of the trial/hearing in the absence of the Appellant and/or his counsel on 19.05.2004.

[7] The appellant (2nd defendant) in his appeal in this case submitted that the Sessions Court judge's continuation of the trial/hearing in the absence of the 2nd defendant and/or his counsel on 19 May 2004 was in breach of the rules of natural justice and that therefore the said trial/hearing was null and void, or rather *void ab initio* as no opportunity was given by the said court to the appellant (2nd defendant) to defend him and/or to be heard – the appellant (2nd defendant) had no opportunity to cross-examine the respondent's (plaintiffs) witness and no defence was called by the court; no submission was made for the defence; the judgment was *ex parte* made after an *ex parte* hearing and the irregularity of the respondent's (plaintiff's) application which was withdrawn after judgment without the knowledge and approval or consent of the appellant.

The Submissions

[8] The respondent (plaintiff) in reply to the appellant's (2nd defendant) submission contended that the learned Sessions Court judge is empowered with discretionary power whether or not to grant an adjournment. The respondent (plaintiff) believed that the learned Sessions Court judge did not err in law and/or misdirect himself and/or act in excess of its jurisdiction to proceed with the continuation of hearing/trial and subsequently in the making of the judgment.

[9] The respondent (plaintiff) further contended that it is totally misconceived and devoid of merits for the appellant (2nd defendant) to allege that he was not given any opportunity to cross-examine the respondent's (plaintiff's) witness.

A **Findings Of The Court**

[10] Before I proceed with the issues in this case, it is important to note that based on appellant (2nd defendant) submission, the appellant's (2nd defendant's) appeal was only on the issues of
B Sessions Court judge refusing to grant an adjournment and not on the merits of the case. Therefore, I now deal with the issues as follows:

[11] Whether the trial judge may proceed with the continuation of hearing despite application for adjournment by counsel for
C appellant (2nd defendant). Whether a mere letter asking for adjournment is sufficient for the said case to be postponed?

[12] Whether the trial judge may proceed to hear the said case in the absence of appellant and/or appellant's counsel on the trial
D date?

Whether The Trial Judge May Proceed With The Continuation Of Hearing Despite Application For Adjournment By Counsel For Appellant (2nd Defendant). Whether A Mere Letter Asking For Adjournment Is
E *Sufficient For The Said Case To Be Postponed?*

[13] Before I answer the question posed here, it is pertinent to quote what has been submitted by counsel for the appellant (2nd defendant) in their submissions, *inter alia*:

F

> The Defendant humbly submitted that the learned Sessions Court Judge was in error and was rather biased when he decided that the case had been adjourned many times before at the request of the learned counsel for the Appellant when actually the Appellant alleged that his counsel was only truthfully responsible for only
G two adjournments. The Appellant's counsel further contended that the learned Sessions Court Judge based his decision on the Practice Direction issued by the Chief Judge of the Federal Court to disallow applications for adjournment for pre-2000 cases and that the circulars do not have the force of law in that such circulars do not over-ride the Rules of Natural Justice.

H

[14] The apex court had stated clear guidelines with regard of entertaining application for an adjournment.

[15] In the Federal Court case of *Lee Ah Tee v. Ong Tiow Pheng*
I *& Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187, Hashim Yeop Sani FJ referred to the Court of Appeal in *Dick v. Piller* [1943] All ER 627 on the issue of the judge's refusal to grant an application for adjournment. He stated that:

We agree to adopt the following principles as regards the discretion in allowing or refusing an adjournment:

(1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts.

(2) *Prima facie* this discretion is unfettered.

(3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.

(4) Although an appellate Court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.

(5) An appellate Court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate Court has power and indeed a duty to review the exercise of the discretion.

[16] Therefore, it is wholly the sole discretion of the judge in granting an adjournment or further adjournment and this discretion is unfettered. In this case, I ruled that the learned Sessions Court judge had exercised his discretion judicially considering the facts as follows;

i. Continuation of trial has been fixed on 7 May 2004. However, the appellant's counsel could not attend the said hearing as he was away in China and as mentioned by stand-in counsel Mr. S. H Lim, counsel for the appellant expected to return on 5 May 2004. However, Mr S. H Lim could not explain why counsel for the appellant could not be present on 5 May 2004. Even a letter dated 5 May 2004 asking for the adjournment on 7 May 2004 did not provide the counsel's available date. Nevertheless, the trial judge adjourned it to 19 May 2004. Mr S. H Lim did not object to it. Again on 19 May 2004, counsel for the appellant applied for adjournment.

[17] I must emphasize that an application of adjournment is not as of right of the counsel. A mere letter applying for an adjournment does not give the applicant/counsel an automatic right. Counsel shall state their reasons clearly for an adjournment accompanied by their next available dates. Counsel shall also take one step further to inquire whether the application was allowed or not before the hearing date. I also must state clearly that the practice of applying for an adjournment at the eleventh hour shall not be encouraged unless in very rare instances. The court's time will be wasted and schedules of cases will be disturbed if this kind of practice is allowed. The appellant should not be too presumptuous and waste the court's time in adjourning the case for too many times without valid reason or justification. Thus, I am satisfied that the learned Sessions Court Judge did not err in any manner in refusing the application for adjournment.

ii. With regard to appellant's contention that Practice Direction issued by the Chief Judge of Federal Court to disallow applications for adjournment for pre-2000 cases and that the circulars do not have the force of law in that such circulars do not over-ride the rules of natural justice, I agree *per se* that this Practice Direction does not have a legal effect or the force of law. But on the contrary, an interesting point to be highlighted is, what is the purpose of having a Practice Direction in the first place if it is not meant to be complied with? It is indeed a proper guideline given to all respective judges and judicial officers in dealing with applications for adjournment.

Whether The Trial Judge May Proceed To Hear The Said Case In The Absence Of Appellant And/Or Appellant's Counsel On The Trial Date?

[18] High Court Rules 1980 has given clear principle with regard to this matter. Order 35 r. 1(2) of the Rules of the High Court set out as follows:

> (2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.

[19] Therefore, this particular provision empowers the learned Sessions Court Judge to continue the trial/hearing without one of the parties present and the learned judge was right in allowing the trial/hearing to continue even without the presence of the appellant and/or his counsel.

[20] In *Burgoise v. Taylor* [1878] 9 Ch D 1 at 5, the English Court held that "any judgment or order given in the absence of a party to the suit may be set aside at the discretion of the court who will look into the reasons for the party's absence." In this case, the appellant's counsel could not attend the trial/hearing because he had to attend another hearing in Kuching and the counsel standing in for the appellant's counsel was not given the authority to conduct a trial. The honourable court in fact had given the opportunity for the appellant and/or his counsel to provide a defence, however they failed to use the opportunity by not attending the trial/hearing.

[21] For the above reasons, this appeal is dismissed with costs for the respondent/plaintiff to be taxed unless otherwise agreed.